U.S. Department of Justice

Immigration and Naturalization Service

[redacted]

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Date: APR 26 2000

IN RE: Applicant: [redacted]

APPLICATION: [redacted]

IN BEHALF OF APPLICANT:

[redacted]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Los Angeles, California, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on May 31, 1958 in San Jose, Costa Rica. The applicant's father, [redacted], was born in Costa Rica in June 1922 and became a naturalized U.S. citizen on March 3, 1970. His mother, [redacted], was born in Costa Rica in 1933 and never became a United States citizen. The applicant's parents married each other in April 1965. The applicant was lawfully admitted for permanent residence on May 2, 1966 (although that evidence is not contained in the present record). He claims eligibility for a certificate of citizenship under § 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1432.

The district director determined the record failed to establish that the applicant met the requirements in that he failed to establish that he had met all the requirements of § 321 of the Act prior to his 18th birthday. The district director then denied the application accordingly.

On appeal, counsel states that the applicant entered the United States as a lawful permanent resident when he was eight years old. His father became a naturalized citizen when [redacted] was 16 years old and [redacted] parents were separated and [redacted] was in the custody of his father.

Section 321(a) of the Act provides, in pertinent part, that:

> A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions, and it is immaterial which of the actions occurred last:
>
> (1) The naturalization of both parents; or
>
> (2) The naturalization of the surviving parent if one of the parents is deceased; or
>
> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if-
>
> (4) Such naturalization takes place while said child is under the age of 18 years; and

> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

The record establishes that (1) the applicant's parents were lawfully admitted for permanent residence in 1963, (2) they married each other in April 1965 in Brooklyn, (3) [redacted] followed them to the United States when he was lawfully admitted in May 1966 and was in the legal custody of both parents, (4) the applicant's father became a naturalized U.S. citizen in 1970 and prior to [redacted] 18th birthday, (5) [redacted] parents separated in December 1973 and [redacted] remained with his father and (6) his parent's divorce became final on May 23, 1980.

However, in order for the applicant to receive the benefits of § 321 of the Act, there must have been a legal separation of the parents. Matter of H--, 3 I&N Dec. 742 (C.O. 1949), held that the term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings.

The record reflects that his parent's divorce became final on March 23, 1980, when the applicant was 21 years, 9 months and 22 days old. Although the applicant's father may have been granted custody when his parents were separated, the parents were not divorced and an award of custody to a naturalized parent under such circumstances does not satisfy the requirement of § 321(a)(3) of the Act and does not result in derivation even though other requisite conditions are satisfied. See INTERP 320.1(a)(6).

There is no provision under the law by which the applicant could have automatically acquired U.S. citizenship through his father's naturalization. Therefore, the district director's decision will be affirmed. This decision is without prejudice to the applicant seeking U.S. citizenship through normal naturalization procedures.

ORDER: The appeal is dismissed.